No. 95-227
(Consolidated with No. 95-124)

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

ALLIANCE FOR COMMUNITY MEDIA,
ALLIANCE FOR COMMUNICATIONS DEMOCRACY,
AND PEOPLE FOR THE AMERICAN WAY, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL FAMILY LEGAL FOUNDATION IN SUPPORT OF THE UNITED STATES

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January 29, 1996

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EDITOR'S NOTE

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CONSENT OF THE PARTIES

Attorneys for Petitioners and Respondents have consented to the filing of an amicus curiae brief by National Family Legal Foundation. (See Appendix B).

INTEREST OF AMICUS CURIAE

National Family Legal Foundation ("NFLF") is a nonprofit, public interest corporation that seeks to preserve the integrity of families and the innocence of children by promoting a healthy and safe environment, free from pornography and the sexual crimes which invariably accompany its widespread availability. NFLF provides legal assistance to individuals, organizations, prosecutors and other public officials concerned about the harmful impact of pornography on the quality of life.

NFLF founder Alan E. Sears was the Executive Director of the Attorney General's Commission on

Pornography. In its 1986 Final Report, the Commission discussed the harms caused by the proliferation of sexual images in our society, and warned against the dangers of exposing children and unconsenting adults to pornography. Mr. Sears and NFLF have been active in urging the Federal Communications Commission to enforce its prohibition of indecent broadcasts, and in urging Congress and the Federal Communications Commission to allow cable companies to prohibit indecency. Former Attorney General Edwin Meese III, who presented the 1986 Commission Report, continues to support enforcing constitutional laws restricting various forms of pornography by serving as an active member of the Board of Directors for National Family Legal Foundation.

SUMMARY OF THE ARGUMENT

This case is indeed about pornography, and more particularly, whether families are required to expose their children to pornographic, indecent speech in order to have access to the latest news, educational programming and entertainment provided by cable television. We know that when cable companies were not given the ability to prevent indecent speech, pornography flourished on leased access and public access television.

As an organization devoted to fighting on behalf of neighborhoods seeking protection from sex businesses, and on behalf of families seeking protection from the devastating influence of pornography on families and children, we believe parents should not have to choose between the benefits of cable and the dangers of easily accessible cable pornography. They should be able to have the advantages of cable TV without fear that their children

will be exposed to pornographic material they would never subscribe to or purchase.

While the government regulation in this case, which allows cable operators to exercise editorial discretion, is not "state action," even if it were, the First Amendment would not be violated by this reasonable restriction on just a portion of the cable television options available to homes. Indecency reaches most people virtually every day from any number of forums, including pay-per-view and premium channels on cable TV. It need not also be given license to pollute leased access and public access channels that are a part of most cable companies' basic package.

ARGUMENT

I. Petitioners' contention notwithstanding, this case is about pornography being pushed on children and unconsenting adults.

"Petitioners cannot overemphasize that, despite Congress's rhetoric in enacting Section 10, this case is not about obscenity or pornography." (Petitioners' brief at 3). Yet Congress seemed to think otherwise, and every major anti-pornography group is concerned enough about the consequences of this Court's decision to file briefs in this case.

The uncontroverted evidence, which was known to and cited by Congress, is that leased access and public access television have for many years been exploited by sexual deviants, from professionals like Al Goldstein to amateurs like Bob Baxter. (See Exhibit A). All of these exploitive cablecasts are pornographic, most are indecent according to the definition this Court provided in *FCC v.*

Pacifica, 438 U.S. 726 (1978), and many border on obscenity. And all are available to any child who can operate a remote control, or to any unconsenting adult who is channel surfing.

The abuses of leased access and public access channels by pornographers were well documented in Congress and before the Federal Communications Commission. Time-Warner testified that Midnight Blue presented videos with graphic scenes of intercourse, masturbation and other sex acts. Public access channels were used to show female nude dancers gyrating with their genitals in full view. On another public access channel a man exposed himself to the camera and urinated on a picture of the President of the United States. (If that had happened outside the studio, he would have been arrested for public indecency; inside the studio, he can safely expose himself to the camera and end up with Petitioners and other activist groups arguing to protect his "freedoms" in the U.S.

Supreme Court!)

No child or unconsenting adult should have to come across such pornography, profanity and vulgarity on their own television. But they will if cable companies are deprived of the right to make editorial judgments for their companies regarding the appropriateness of certain programs.

II. This case is not about "censorship," because by its very terms the statutory language at issue merely frees up local companies to exercise their own editorial discretion regarding "indecent" cablecasts, and therefore does not constitute "state action".

What this case is truly not about is "censorship," a word that finds its way into Petitioners' brief with alarming frequency. Censorship in violation of the First Amendment is by definition an action only the government can take. All the government did in this case was remove an obstacle to the freedom of cable companies to keep indecent programming from assaulting unsuspecting subscribers.

And the obstacle the statute removed was one of Congress's own creation. See Cable Communications Policy Act of 1984, 47 U.S.C. §§ 531 (e), 532 (c)(2), Stat. App. 1a, 4a.

The relevant language from Section 10(a) of the Cable Television Consumer Protection and Competition Act of 1992, which applies to leased access, states that "[t]his subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 47 U.S.C. § 532(h). Section 10(c) applies to public access channels, and requires the FCC to promulgate regulations prohibiting programming that contains "sexually explicit conduct" or "material soliciting or promoting unlawful conduct." 47 U.S.C. § 531.

This is not brain surgery. A lengthy analysis of

legislative history is unnecessary, and largely irrelevant. The law speaks for itself. It says that the FCC needs to come up with regulations that permit cable operators to create a policy for prohibiting indecent programs. It is not a law that requires cable operators to create and enforce such a policy. Because there is no "coercion" or "significant encouragement" from the federal government, there is no "state action": "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982). Allowing cable companies to exercise editorial discretion is not "state action."

III. Even if this Court finds "state action," the statute is constitutional because applying the well-defined "indecency" standard to a portion of the cable available to homes is a permissible attempt to regulate the time, place and manner of indecent speech in

order to protect children and unconsenting adults in the sanctity of their home.

Even if this Court concludes that the exercise of editorial discretion by cable companies is "state action," we reject the government's "concession" that the First Amendment is violated. An unnecessary concession by the government might affect its enforcement decisions, but should not affect this Court's constitutional interpretation.

The indecency standard is not vague or unascertainable. It is nuisance speech which, although entitled to some First Amendment protection, is also subject to reasonable time, place and manner regulation to prevent it from assaulting children and unconsenting adults, particularly in the privacy of their own home. Anyone who subscribes to cable has numerous opportunities to purchase indecent speech, and perhaps even obscenity, through premium channels and pay-per-view. But leased access and public access channels are nearly always free with a basic

service subscription. If Petitioners' succeed in this challenge, a customer who desired to protect the sanctity of his home from indecent speech would have to cancel cable, surrendering his right to receive any cable channels at all, in order to protect his children from exposure to indecency. Surely our Constitution does not require families to sacrifice access to the latest news, education and entertainment on the altar of "patently offensive descriptions or representations of sexual or excretory functions."

This Court has consistently held that there are classes of "speech" which are outside the protection of the First Amendment. For example, obscenity is not protected by the First Amendment. *Miller v. California*, 413 U.S. 15 (1973); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) ("fighting words" unprotected)[1]; *Hess v. Indiana*, 414 U.S.

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[1] In *Rosenfeld v. New Jersey*, 408 U.S. 901, 905-06 (1972), three dissenting justices expressly noted that *Chaplinsky*'s First Amendment exceptions encompassed nuisance speech.

105 (1973) (speech advocating imminent violence unprotected). This case implicates yet another class of speech which does not enjoy constitutional protection -- nuisance speech.

Nuisance speech is speech which, in view of the time, place or manner of its delivery, unduly and unreasonably interferes with the privacy of the home. *See Kovacs v. Cooper*, 336 U.S. 77 (1949); *Hess*, 414 U.S. at 107-108; *Mesarosh v. State*, 459 N.E. 2d 426, 427-28 (Ind. Ct. App. 1984); see also Chafee, Free Speech in the United States, (1941) at 148-150.

In *FCC v. Pacifica*, 438 U.S. 726 (1978), this Court recognized that indecent speech constitutes a nuisance and is subject to stringent regulation in the context of the broadcast medium. In *Pacifica*, the Supreme Court held that a monologue entitled "filthy words" was indecent as broadcast and therefore violative of 18 U.S.C. §1464. *Id.* In concluding that a broadcast of "patently offensive words

dealing with sex and excretion" could be regulated "because of its content", the *Pacifica* Court noted that: "[Indecent speech] offend[s] for the same reason obscenity offends. . . . [S]uch utterances are no essential part of any exposition of ideas and are of . . . slight social value." 438 U.S. at 746.

This Court has permitted the government to protect the privacy of the home from intrusive and offensive speech in other contexts as well. In *Breard v. Alexandria*, 341 U.S. 622 (1951), this Court sustained an ordinance aimed at methods of communication which intrude uninvited into the privacy of the home. In the same vein, this Court in *Kovacs* observed "that more people may be . . . reached by sound trucks . . . is not enough to call forth constitutional protection for what is . . . a nuisance." 336 U.S. at 88-89; *see Tallman v. United States*, 465 F.2d 282, 285-86 (7th Cir. 1972).

In *Hess*, this Court explicitly recognized that

"nuisance speech" is unprotected by the First Amendment, concluding that the speech at issue in that case was protected, in part, because it did not "amount to a public nuisance in that privacy rights were not being invaded." 414 U.S. at 107-108. Finally, in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), Justice Stevens noted in dissent that "[v]ulgar language, like vulgar animals, may be acceptable in some contexts, and intolerable in others. . .. It seems fairly obvious that Respondent's speech would be inappropriate in certain . . . settings." *Id.* at 696. The majority in *Bethel* held that a student could be penalized, consistently with the Constitution, for making indecent remarks in a speech before a school assembly. 478 U.S at 696.

IV. Cablecast indecency may be extensively regulated because it is unprotected nuisance speech.

The evils Congress sought to prevent, and the governmental interests which justify regulating broadcast

indecency, apply with undiminished force to the regulation of cablecast indecency. This Court in *Pacifica* noted with approval the two main concerns motivating the FCC -- the intrusive nature of broadcasting (where programming comes directly into the home creating the danger that the sensibilities of unwilling recipients would be offended) and the risk of exposing children to indecency. *Pacifica*, 438 U.S. at 748-49. The same concerns justify the regulation of indecent cablecasts. The television which supplies broadcast indecency also supplies cablecast indecency. *Pacifica* teaches that there is no constitutionally significant difference as to whether the "pig comes into the parlor" via the public airways, or along a coaxial cable. *Id.* at 750.

Moreover, no greater scope of choice inheres in the decision to receive cable television signals in the home. The person who purchases a television "elects" to receive broadcasts. *Pacifica* clearly stands for the proposition that it does not follow that he wants indecent material broadcast

into his home. 438 U.S. at 749. Similarly, the purchaser of basic cable services "elects" to receive cable television programs. Under the logic of *Pacifica*, it does not follow that he also desires to have indecent materials cable cast into his home. Indeed, if citizens are entitled to be in a public place without having to turn their eyes to avoid sexually explicit nudity, they must, a fortiori, be entitled to be in the privacy of their homes without having to "flip the dial" to avoid being bombarded with indecent images. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 564 (1991).

In short, Congress can prohibit cablecast indecency because it constitutes a nuisance and nuisance speech is not protected by the First Amendment. Congress can, of course, regulate the presentation of cablecast indecency rather than prohibit it outright, as it did with Section 10 of the 1992 Cable Act. Section 10 is therefore an appropriate and lawful exercise of legislative power.

CONCLUSION

American society has suffered from a tremendous decline in civility over the past few decades. Common courtesy and decency seem to be relics of a previous generation. This decline can be seen in everything from minor traffic altercations that end with gunfire to profane bumper stickers, from stadiums full of sports fans shouting vulgar slogans in unison to the coarseness of our entertainment culture.

Constitutionally protected "indecent" speech -- speech that has never been the highest priority for our nation or this Court -- speech that reaches depths of offensiveness that few seek to descend to -- is everywhere available. You hear it on the streets, at the ballgames, on videotapes and record albums, in our films, through the telephone, and yes, on cable television through pay per view and premium channels. Isn't that enough? Can't families

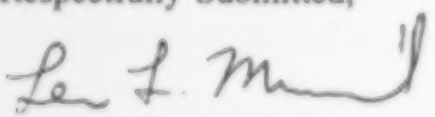
with young children, in the privacy of their own home, seek out the entertainment afforded by basic cable television without risking exposure to hard-core sex acts and nude dancing? Can they leave their teenagers home alone with the television? Or must this one area of entertainment, one small part of one large medium, also be soiled by indecency? Is our freedom really so fragile that it is unconstitutionally damaged by allowing cable companies to say no to frontal scenes of male urination?

Must they be asked to turn the dial after exposure, which as this Court pointed out in Pacifica is like suggesting the remedy for assault is to run away after the first blow? Or worse, must they abandon the news, education and entertainment offered by cable television by canceling any service at all?

On behalf of decent families and children throughout America, we urge this Court to uphold the constitutionality of Section 10 of the 1992 Cable Act, and free cable

companies to clean up their public and leased access channels without interference from the government.

Respectfully Submitted,



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APPENDIX A

Dimension Cabie Company (now Cox Communications) aired the broadcast recorded on this video labeled as Exhibit "A", in Phoenix, Arizona on public access channel 22 at 11:00 p.m. on Saturday, July 30, 1994. Exhibit "A" was videotaped in a private home after its discovery while channel surfing, so the tape begins mid-way into the presentation:

The scene opens with an interview conducted by a male who identifies himself as Bob Baxter. He is interviewing a nude female, identified as Ms. Nude Texas, who is standing with her arms down at her side. Both of her breasts and her front pubic hair are fully exposed during an approximate two-and-one-half minute interview.

Scene moves outside by swimming pool, where Bob Baxter introduces the physical exhibition segment of the competiton by Ms. Nude Texas. She places herself on a zebra print blanket by the pool and begins to stretch and pose. She spreads her legs, stretches back to lift her breasts upward, raises her body up with both arms and legs down, lifting her head up and pushing her buttocks up with genital area exposed. She stands up and leans over frontwards, with a camera shot close-up of her buttocks and anus.

Bob Baxter interviews the next contestant, "Molly," Ms. Nude Washington, who reveals her fully nude breasts. The scene changes to the inside set where another interview is conducted with the blond female identified as "Molly" standing with her bare breasts in full view. Back outside, Molly reveals full frontal nudity and is shown in successive scenes fondling her own breasts, and making various sexually explicit movements while laying face up totally nude on a raft in the pool. Molly ends her exhibition by bowing with her back to the camera, facing a group of males, with her bare buttocks filling the screen.

Three females are standing together outside playfully doing a "can-can" type dance. In this scene there is full frontal nudity. The girls move around to the music and close by turning their backs to the camera and bowing together, with their bare buttocks fully exposed. The camera zooms in on the exposed anus of the female in the center of the group.

The winners of the Ms. Nude America contest are announced. The winner is identified as contestant Lorraine, Ms. Nude New York. She participates in an interview with Bob Baxter and full frontal nudity is on camera for several minutes.

The broadcast concludes with camera shots around the swimming pool with various unidentified nude males and females talking, walking, and sunning themselves.

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January 16, 1996

Len L. Munsil, Esq.
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National Family Legal Foundation
11000 North Scottsdale Road
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Scottsdale, Arizona 85254

Re: Alliance for Community Media v. FCC, No. 95-227 (S. Ct.)

Dear Mr. Munsil:

On behalf of the Alliance for Community Media, the Alliance for Communications Democracy, and People For the American Way, I hereby consent to the National Family Legal Foundation filing an amicus curiae brief in the above-captioned case.

Please note that this consent applies to the above three organizations only. You will need to obtain the consent of the other parties from their respective counsel.

Please call me if you have any questions.

Very truly yours,

Michael K. Isenman

cc: James A. Feldman, Esq.

U. S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

January 16, 1996

Len L. Munsil, Esq.
National Family Legal Foundation
11000 North Scottsdale Road
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Re: The Alliance For Community Media, et al. v. FCC, No. 95-227

Dear Mr. Munsil:

As requested in your letter of January 3, 1996, I hereby consent to the filing of an amicus curiae brief on behalf of the National Family Legal Foundation in the above-captioned case.

Sincerely,

Drew S. Days, III

Drew S. Days, III
Solicitor General

cc: William K. Suter, Esq.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Denver Area Educational Telecomm
from Cable

I hereby consent to the filing of an Amicus Curiae Brief in [redacted] v. FCC, #95-124 (consolidated with #95-227), by the National Family Legal Foundation.

1-25-96
Date

Charles S. Sims

I, Robert T. Perry, do hereby consent to the filing of an Amicus Curiae Brief in *Alliance v. FCC*, No. 95-227, consolidated with 95-124, by the National Family Legal Foundation.

1/24/96
Date

Robert T. Perry
Robert T. Perry

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing "Brief of Amicus Curiae National Family Legal Foundation In Support of the United States" have been sent by U.S. Mail, Postage Prepaid, on this 29th day of January, 1996, to:

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